In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1194

IRVING KAHN AND MINNIE KAHN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners argue that interstate telephone conversations between husband and wife in which illegal gambling business was discussed, intercepted pursuant to court orders, should be suppressed under the "marital privilege."

On application of the government, the United States District Court for the Northern District of Illinois entered an order on March 20, 1970, authorizing the interception of telephone communications of "Irving Kahn and others as yet unknown" concerning certain gambling offenses in violation of 18 U.S.C. 1952. The order authorized the interception of telephone communications over the telephone located in the Kahn residence in Chicago. One of the calls which was intercepted pursuant to this court order was a telephone call from

Irving Kahn in Arizona to his wife, Minnie Kahn, at the residence phone in Chicago. In this interstate conversation, they discussed gambling wins and losses. Subsequently, Mrs. Kahn made two calls to a known gambling figure and discussed numbers and amounts of bets and identities of bettors (Pet. App. 2-3).

Petitioners were subsequently indicted for violation of 18 U.S.C. 1952. When the government indicated that it intended to use evidence obtained from a court ordered wiretap, petitioners moved to suppress. The district court thereupon ordered that evidence of telephone conversations between Irving Kahn and his wife should be suppressed under the "marital privilege." The court further ordered that all conversations not involving Irving Kahn as one of the parties should be suppressed as outside the scope of the court authorization (G. App. 23a).[1] On appeal by the government, a divided court of appeals reversed the decision of the district court on the marital privilege, but ruled that all conversations not between Irving Kahn and a person unknown must be suppressed. The court of appeals further found that Minnie Kahn was not a person unknown within the meaning of the court order because the government had not shown that further pre-intercept investigation would not have revealed her complicity (Pet. App. 8-14). Both the government and petitioners sought a rehearing in the court of appeals which was denied on January 29, 1973 (Pet. App. 21).

The government has petitioned this Court for a writ of certiorari to review that part of the court of appeals

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[1] "G. App." refers to the government's appendix filed with our petition for a writ of certiorari to review the other aspect of the court of appeals decision in this case (No. 72-1328).

decision upholding the suppression (No. 72-1328). Petitioners here seek review of that part of the court of appeals decision holding that the marital privilege was not applicable to the conversations sought to be suppressed.

1. There is no merit to petitioners' claim that evidence of their interstate gambling conversation should be suppressed under the marital privilege doctrine. In a federal trial, the admission of evidence, and competency and privileges of witnesses, is governed by principles of common law as interpreted by the federal courts in light of reason and experience. Rule 26, Fed. R. Crim. P.; *Hawkins* v. *United States,* 358 U.S. 74, 77.[2] There are two different evidentiary privileges arising from the marital relationship: the privilege excluding the testimony of one spouse against the other, and the immunity of confidential communications between husband and wife. *Wolfle* v. *United States,* 291 U.S. 7, 14; VIII Wigmore, *Evidence* (McNaughton rev. 1961) §§ 2333-2334. Neither aspect of the privilege is applicable in this case.

That aspect of the privilege which prevents one spouse from testifying against the other is based on the principle of promoting marital peace and harmony. *Hawkins* v. *United States, supra,* 358 U.S. at 77-78. Since disclosure of the intercepted conversation here is neither directly nor indirectly testimony by the spouse affecting the harmony of the marital relationship, the court of appeals correctly

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[2] The Illinois marital privilege statute cited by petitioners (Pet. 13) is therefore inapplicable.

found this aspect of the privilege not applicable (Pet. App. 6-8).[3]

There is also no merit to petitioners' claim that the communication itself was privileged, and hence, could not be disclosed at trial. Communications that promote a crime are not covered by the second branch of the marital privilege. Under 18 U.S.C. 2517(4) an *otherwise* privileged communication does not lose its privileged character as a result of court-authorized, surreptitious electronic interception and therefore could not be disclosed at trial. But this provision has no applicability if, as here, the communication, absent the interception, would not have been privileged under the common law rules as interpreted by the federal courts. See S. Rep. No. 1097, 90th Cong., 2d Sess. at 100.[4] Conversations, such as those between Irving and Minnie Kahn here,

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[3] There is some conflict whether testimonial statements by one spouse to a third party may be used in evidence when presented by the third party to whom they were made. The exclusion of such statements was adopted as the rule in *Ivey* v. *United States*, 344 F. 2d 770 (C.A. 5); cf. *Peek* v. *United States*, 321 F. 2d 934 (C.A. 9) (dicta); *United States* v. *Winfree*, 170 F. Supp. 659 (E.D. Pa.). The opposite view, that such declarations by one spouse may be testified to by a third party since this does not contravene the purpose of the rule, has been adopted in *United States* v. *Doughty*, 460 F. 2d 1360, 1364 (C.A. 7) and *United States* v. *Mackiewicz*, 401 F. 2d 219 (C.A. 2). See also *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2). This question is not raised here, however, since there was no knowing disclosure by either spouse which could affect the family harmony.

[4] This provision is similar to the provision in §5.11(b) of the A.B.A. Standards on Electronic Surveillance. The commentary to this section notes that some jurisdictions provide that any access to the communication by a third party, even as an eavesdropper, destroys the privilege, and that the integrity of various confidential relationships would be undermined if electronic eavesdropping on the conversation had this effect. The standard, therefore, specifi-

made in furtherance of a criminal activity, are not so privileged.[5] The basis of the privilege is the protection of marital confidence regarded as essential to the marriage relationship. See *United States* v. *Wolfle*, *supra*, 291 U.S. at 14. As this Court said (*ibid.*):

> Communications between the spouses, privately made, are generally assumed to have been intended to be confidential and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication.

In this case, the court below found that the intercepted conversation was made on the basis of the relationship between Irving and Minnie Kahn in the conduct of their illegal gambling business, not on the basis of a marital relationship. Therefore, although as partners in an illegal enterprise they undoubtedly intended their conversation to be "confidential", the nature of the conversation shows that it involved no marital confidences and was thus not the kind of communication to which the law accords privileged status.[6] The provision of 18 U.S.C.

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cally abrogates this rule. The commentary also notes, however, that criminal conversations, as in this case, not being otherwise privileged, would not be affected. See A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, Approved Draft, pp. 152-158 (March 1971).

[5] Similarly, this Court has recognized the inapplicability of the attorney-client privilege to protect communications made in furtherance of a crime. *Clark* v. *United States*, 289 U.S. 1, 15, as well as the inapplicability of the juror-secrecy privilege in a case of jury fraud, *id.* at 16.

[6] Neither *Wolfle* v. *United States*, *supra*, 291 U.S. 7, nor *Blau* v. *United States*, 340 U.S. 332, cited by petitioners (Pet. 12), indi-

2517(4) therefore, is inapplicable and the conversation was properly held admissible in evidence.*

2. The conversation between Irving and Minnie Kahn in this case was not only in furtherance of their illegal gambling business, but was itself an offense under 18 U.S.C. 1952. Under the rule which petitioners have urged this Court to adopt, spouses could commit this offense with impunity, because the conversation could never be disclosed and neither spouse could testify to it. Such a result would promote neither the legitimate interests of the marital relationship nor the societal interest in preventing crime.

Therefore, irrespective of the action the Court takes in connection with the government's pending petition for review of other questions in this case, the instant petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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cates otherwise. In *Wolfle*, the Court decided that the letter from husband to wife was not intended to be confidential because it was dictated to a secretary. *Blau* involved a husband's "refusal to betray his wife's trust" (340 U.S. at 334) in confiding her whereabouts to him while she was attempting to avoid testifying before a grand jury. Therefore, the application of the privilege protected a marital confidence. Moreover, as the court below noted, neither case involved communications in furtherance of on-going criminal activity (Pet. App. 7).

* This conversation would also be admissible under Rule 505 of the Proposed Federal Rules of Evidence, which would eliminate the privilege for the communication and limit the privilege only to preventing testimony by a spouse. A similar result would also be reached under Rule 28(2)(e), Uniform Rules of Evidence, under which conversations relating to crimes are expressly made admissible. See, also, Rules 214-218, ALI Model Code of Evidence (1942); Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 Harv. L. Rev. 730, 734 (1964).